APR 28 1917
JAMES D. MAHER
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN KENNY,

Petitioner,

vs.

LABAN MILES AND JOHN L. BIRD, Administrators of the Estate of Lah-tah-sah, deceased, Osage Allottee, No. 256,

Respondents.

No. 1093

BRIEF OF PETITIONER,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

STATE CAPITAL PUB. CO., OKLAHOMA CITY, OKLA.

INDEX.

PAGE.

STATEMENT OF THE CASE..... 1-8

Question Involved: Did the Supreme Court of the State of Oklahoma deny petitioner the title, rights, privileges and immunities under the statutes of the United States especially set up and claimed by him as an heir of a deceased Osage allottee?

It is contended that the court did so in affirming the judgment below, overruling petitioner's demurrer, striking out paragraphs of petitioner's answer, in admissions of evidence, and in findings with respect to time of allotments.

Where, for the purpose of trial, it is admitted that lands were allotted to a deceased Osage allottee in her lifetime, the theory of the case will not be changed on appeal, and, as affecting questions of restriction, it is immaterial that the deeds are not executed until after her death.

Aaron et al. vs. *U. S.*, 204 Fed. 943..... 11

2. The State Supreme Court erred in holding that the Act of Congress of June 28, 1906, the Osage Allotment Act, placed no restriction upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is ex-

pressly inhibited, and in holding that the purpose of the Act of Congress of April 15, 1912, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who had subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom certificates of competency were issued.

Prior to the division of the Osage Indian Reservation, the title thereto reposed in the Tribe in trust for its members, who occupied same under authority of the United States, without power of alienation. *Labadie* vs. *U. S.*, 51 Pac. 666, 6 Okla. 400.

U. S. vs. *Aaron et al.*, 183 Fed. 347..... 12

The Osage Allotment Act, imposing restrictions and providing how such lands could be sold, prohibited their sale in any other way.

Stevens vs. *Smith*, 10 Wall 321..... 13

Restrictions on Indian lands run with the land, not, however, to restrict a white man, not a member of the Tribe.

Goodrun vs. *Buffalo*, 162 Fed. 817.

Levindale Lead & Zinc Min. Co. vs. *Coleman*, 140 Pac. 607.

Same, 241 U. S. 432..... 13

The Osage Allotment Act imposed restrictions on inherited lands without reference to whether the allottee died before or after allotment 13

The Act of Congress of March 3, 1909, also imposed restrictions..... 17

3. The State Supreme Court erred in holding that the District Court of Osage County, Okla., had jurisdiction to partition the lands involed, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question.

The Court had no jurisdiction over the lands, except such as were given by Act of Congress.

McKay vs. *Kalyston*, 204 U. S. 458.

U. S. vs. *Richert*, 188 C. S. 432..... 17

U. S. ex rel. West vs. *Hitchcock*, 205 U. S. 80 18

This being restricted land, and the partition judgment being subject to review by the Secretary, the same was not judicial action and could not be *res adjudicata.*

U. S. vs. *Ferririo*, 18 How. 41, 14 Ed. L. 42.

Gordon vs. *U. S.*, 2 Wall. 561, 17 Ed. L. 921.

In Matter of Sambora, 148 U. S. 222, 37 L. Ed. 429.

S. Dakota vs. *S. Carolina*, 48 L. Ed. 461

LaAbra Silver Min. Co. vs. *U. S.*, 175 U. S. 455, 44 L. Ed. 234.

Dist. of Columbia vs. *Eslin*, 183 U. S. 62, 46 L. Ed. 85.

Cochran et al. vs. *Blank et al.*, 156 Pac. 324.

Hope vs. *Foley*, 157 Pac. 727.

Tiger et al. vs. *Creek Co.*, 146 Pac. 912.... 18

Nor did it have the finality making it *res adjudicata.*
Bigelow on Estoppel, 64, 65.

23 Cyc. 1128..... 18

Nor was it *res adjudicata* of the incidental question of heirship.

2 Black on Judgments, 611, 613..... 18

IN THE SUPREME COURT
OF THE UNITED STATES

JOHN KENNY,

Petitioner,

vs.

LABAN MILES AND JOHN L. BIRD, Administrators of the Estate of Lah-tah-sah, deceased, Osage Allottee, No. 256,

Respondents.

No _____

BRIEF OF PETITIONER,

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

STATEMENT.

This is a contest of heirs to the estate of a deceased Osage allottee. Lah-tah-sah, the deceased, was a full-blood Osage Indian woman, who died in Osage County, Oklahoma, where she had been allotted lands, without receiving a certificate of competency or having her restrictions removed. She left surviving her, the petitioner member of said Tribe in Oklahoma, who has not received a certificate of competency nor had his restrictions removed, and who claims to have been married to Lah-tah-sah before her death, and, as her surviving husband, an heir inheriting one-half of her estate.

This case had its inception in a probate proceeding in the County Court of Osage County, Oklahoma, by a petition for administration upon the estate of the deceased, signed by the said Laban Miles, asking the appointment of John L. Bird, the other respondent herein, as administrator, and, among other things, alleging:

> "The general character and probable value of the estate left by the deceased is as follows:
>
> Lands allotted to her, as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $500, and Tribal Trust Funds belonging to her, as a member of said Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities, of the approximate yearly income of $600."

Upon the appointment of such administrator, an appraisement was had and returned into that court, as authorized by the laws governing the procedure thereof, showing the real estate of the decedent to consist of the

> Northwest Quarter (NW¼) of Section 26, Township 24, Range 4, homestead; and the East Half (E½) of Section 30, Township 28, Range 9, containing 320 acres; Lot Three (3) East Half (E½) of the Southwest Quarter (SW¼) of Northwest Quarter (NW¼),Southeast Quarter (SE¼) of the Northwest Quarter (NW¼) of Section 4, Township 20, Range 10, containing 110.12 acres; North Half (N½) of Southeast Quarter (SE¼) of Section 4, Township 20, Range 10, containing 80 acres; all North and East of the Indian Meridian in Osage County, Oklahoma.

In the course of the administration, the administrator filed his final report, praying distribution of the estate and suggesting that the petitioner herein and the said Laban Miles were heirs of Lah-tah-sah and entitled to inherit equally. In reply thereto, the petitioner filed herein, who is her son and who is also a full-blood Osage Indian, an allottee and member of that Tribe in Oklahoma, who has not received a certificate of competency nor had his restrictions removed; and the respondent

Laban Miles is a full-blood Osage Indian and allottee and his objections to the claim of the said Laban Miles as such husband and heir, claiming to be the sole heir of the deceased and objecting to the distribution of any of such estate to the said Laban Miles. To this, the said Laban Miles filed his plea of *res adjudicata,* as set out in the petition herein, alleging, substantially, that by the previous judgment of the District Court of Osage County, rendered in April, 1913, in the partition action brought by Laban Miles against John Kenny, the issue of heirship and Miles' right to inherit had been adjudicated and was final.

The journal entry of judgment attached to such plea of *res adjudicata* showed that the deceased and Laban Miles were both full-blood Osage Indians, and described lands which the court judicially knew to be a part of the Osage Tribal lands which had been distributed by allotments, and that the said Lah-tah-sah was an Osage allottee, and contained the purported finding by the court, that these lands had been allotted and deed to Lah-tah-sah, and that Lah-tah-sah died intestate on or about the 19th day of August, 1908, leaving an estate consisting in part of lands, the description of which showed them to be the same lands as hereinbefore described in this brief; and such plea of *res adjudicata* failed to show that either of such Indians had received certificates of competency or had had their restrictions removed; or that the Honorable Secretary of the Interior had approved such partition judgment, as required by Section 6 of the Act of Congress, approved April 18, 1912, 37 Stat. L. 86, providing:

> "That from and after the approval of this Act, the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction, in accordance with the laws of the State of Oklahoma; provided, that no partition or sale of the restricted land of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior."

There being no contention that the heirs had ever consented to such partition, but the pleadings in the case showing that the petitioner resisted such. To this plea of *res adjudicata* of Laban Miles, the petitioner filed his demurrer, as alleged in the petition herein, which was overruled by the County Court and exceptions taken. Thereupon, petitioner filed his answer, as alleged in the petition herein, to which the said Laban Miles filed his motion to strike, as alleged in the petition herein, and the County Court, ruling thereon, struck out the second paragraph of said answer, to which petitioner excepted.

Trial being had in the County Court and judgment and decree being rendered against the petitioner, appeal therefrom was duly taken to, and a trial thereof *de novo* on both questions of law and fact demanded, in the District Court of Osage County.

In that manner the case came to the District Court of Osage County. Upon the trial of the case in the District Court of Osage County, that court overruled petitioner's demurrer to said plea of *res adjudicata,* to which petitioner excepted; and struck out paragraphs 2, 3-a, 3-b and 3-c of petitioner's answer to such plea of *res adjudicata,* to which ruling petitioner excepted; and admitted the said partition judgment, copy of which was attached to such plea of *res adjudicata,* and other incompetent testimony with respect thereto in the trial of the case in the District Court, over the objections of the petitioner and to which petitioner excepted; and rejected and excluded competent testimony offered by petitioner to answer and refute the issues of such plea of *res adjudicata,* to which petitioner excepted; all as set out in the petition herein and the record attached thereto. This, notwithstanding the petitioner proved in the trial in such district court that he and the said Lah-tah-sah and the said Laban Miles were all full-blood members of the Osage Tribe of Indians in Oklahoma, allottees of such Tribe, and that neither had received a certificate of competency or had their restrictions removed; and that he had not consented to the partition of such lands, and that the said judgment

in the partition action and the partition pleaded and offered in evidence had not been approved by the Honorable Secretary of the Interior.

It further appeared that the allotment deeds in the above case were signed by the principal chief, the homestead deed on September 23, 1908, and the ,deed conveying the surplus land on May 5, 1909.

Said District Court, holding that said judgment in the partition action previously rendered was *res adjudicata* of the same issues in such proceeding in administration, denied the petitioner the several rights especially set up by him, and rendered judgment and decree against him and in favor of the said Laban Miles, decreeing that the said Laban Miles was heir-at-law of said deceased and was entitled to inherit one-half her estate, and distributed one-half to him, to which petitioner objected. Thereupon. the petitioner duly appealed to the Supreme Court of the State of Oklahoma, which action was therein numbered 7708 and styled "John Kenny, Plaintiff in Error, vs. Laban Miles and John L. Bird, Administrator of the Estate of Lah-tah-sah, Osage Allottee No. 256, deceased, Defendants in Error," that being the highest court of the State in which a judgment or decision in said case could be rendered.

Upon the due presentation of such appeal to said State Supreme Court, upon the opinion of one of its Commissions, authorized by the state laws so to act and to prepare opinions, which was approved by the said Supreme Court, a copy of which opinion is contained in the transcript attached to the petition herein, said State Supreme Court, holding that said lands were selected in the right of Lah-tah-sah after her death, affirmed the judgment and decree of the District Court. The State Supreme Court considered the Act of Congress of June 28, 1906, the Osage Allotment Act, 34 Stat. L. 539, the Joint Resolution of Congress approved February 27, 1909, 35 Stat. L. 1167, the Act of Congress of March 3,

1909, 35 Stat. L. 778, and the Act of Congress of April 18, 1912, 37 Stat. L. 86, and held:

> "The Act of Congress of June 28, 1906, Chap. 572, 34 Stat. L. 539, placed no restrictions upon the alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interests therein, reserved to the Tribe, individual disposition of which is expressly inhibited."

> "That the purpose of the Act of Congress of April 18, 1912, 34 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorized the conveyance of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who had subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom no certificates of competency were issued."

And, also:

> "That the District Court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question."

The said State Supreme Court considered fully the federal questions involved, and denied petitioner the title, rights, privileges and immunities under such federal statutes especially set up and claimed by him:

> (a) In affirming the judgment overruling petitioner's demurrer to such plea of *res adjudicata.*

> (b) In affirming the judgment sustaining the ruling of the trial court, striking out the designated paragraphs of petitioner's answer.

> (c) In affirming the judgment of the trial court admitting incompetent evidence offered by said Laban Miles with respect to such plea of *res adjudicata.*

> (d) In affirming the judgment of the trial court rejecting and excluding competent testimony offered

by petitioner, that the said Laban Miles had not been married to and was not the husband or heir of the said decedent.

(e) In finding and holding that such lands had been selected in the right of the said Lah-tah-sah after her death; and in failing to find and hold that the said lands had been selected and allotted to the said Lah-tah-sah before her death, and that the said Laban Miles, because of the facts and admissions in the record and the theory of the proceeding, and upon which the case was tried below, was estopped to deny that the said lands were the lands, and the restricted lands, of the said deceased Osage allottee.

(f) In failing to find and to hold that the said lands involved were the restricted lands of a deceased Osage allottee, and that the judgment and proceedings pleaded as *res adjudicata*, not having been approved by the Honorable Secretary of the Interior, were invalid, and not decisive of any of the issues involved in such administration proceeding, and not evidence of the truth of any of its purported findings or recitals.

(g) In holding that the Act of Congress of June 28, 1906, Chap. 572, Stat. L. 539, placed no restrictions upon the alienation by heirs to inherited lands allotted and deeded in the right of a member of the Osage Tribe of Indians after his death, save only the mineral interest therein, reserved to the Tribe, individual disposition of which is expressly inhibited. And the said State Supreme Court erred in failing to find and to hold that the said Act of Congress did place restrictions upon said lands and the Act of Congress of March 3, 1909, 35 Stat. L. 778, imposed restrictions on such lands and continued previous restrictions thereon; and in failing to find and to hold that the Osage tribal lands in Oklahoma, of which these allotments were parts, were subject to restriction and held by the Tribe, and that such restrictions, under the legislation for the division of such lands among the members of such Tribe, continued until certificates of competency were issued to the allottee, or the same was sold under the rules and regulations and subject to the approval of the Honorable Secretary of the Interior.

(h) And in finding and in holding that the purpose of the Act of Congress of April 15, 1912, 37 Stat. L. 86, Chap. 83, was not to impose restrictions upon alienation of Osage lands, but to authorize the conveyance of such of said lands to which restrictions had attached by reason of their allotment to living members of the Tribe, who have subsequently died, leaving surviving them Indian heirs, members of the Tribe, to whom certificates of competency were issued; and said Supreme Court erred in not holding that the purpose of said Act of Congress was to restrict the partition of lands of the character herein involved subject to the approval of the Honorable Secretary of the Interior.

(i) And in holding that the District Court of Osage County had jurisdiction to partition the lands involved, that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question; and the said State Supreme Court erred in not holding that the said judgment of the District Court of Osage County, partitioning said lands, not being approved by the Honorable Secretary of the Interior, was invalid for any purpose whatever.

(j) In depriving petitioner of one-half of such trust funds and allotted lands by the use and means of such partition judgment, which was invalid and of no force for the purpose for which it was rendered.

(k) In giving force indirectly to such invalid judgment, when it was not enforceable directly.

(l) In depriving petitioner of the rights and privileges of the guardianship of the Government and the protection and supervision of the Honorable Secretary of the Interior with respect to such inherited Indian lands.

(m) In denying petitioner immunity from the operation and effect of said partition judgment until the same is approved by the Honorable Secretary of the Interior.

(n) In affirming the judgment of said District Court and denying petitioner a re-hearing therein and thereof.

ARGUMENT.

The errors hereinbefore mentioned, and the reasons urged for the issuance of the writ of certiorari, may be grouped under three distinct heads, following:

First. The erroneous view of the pleadings and of the facts taken by the trial court and the State Supreme Court, that because deeds were not issued until after the death of Lah-tah-sah, such lands were not selected or allotted to her until after her death. Under this heading may be included the reasons hereinbfeore designated "(a), (b), (c), (d), (e) and (f)." The judgment rendered by the District Court of Osage County in April, 1913, in the partition proceeding, and pleaded in the instant case as *res adjudicata*, showed that Lah-tah-sah and Laban Miles were both full-blood Osage Indians, that Lah-tah-sah was an allottee, that the lands were parts of the former Osage Indian Reservation, which was divided among the members of such Tribe, and that Lah-tah-sah died intestate, leaving an estate consisting in part of these lands. This clearly showed that the lands were the lands of a deceased Osage allottee, and should have been treated as Laban Miles' admission to that effect, and this plea of *res adjudicata* failing to show that Lah-tah-sah, or Laban Miles, or the petitioner, had received certificates of competency, or that the Honorable Secretary of the Interior had approved such judgment and proceeding, was clearly insufficient to conclude the petitioner with respect to the findings and recitals and decrees in such judgment, and the demurrer should have been sustained. However, the demurrer being overruled, and petitioner having answered, joining issue on such plea, that the lands involved were the restricted lands of a deceased Osage allottee, and that the said judgment and proceeding had not been approved by the Honorable Secretary of the Interior,

and that Laban Miles had not been married to and was not the husband or heir of the deceased, it was error to strike out the paragraphs of the answer tendering such issues.

The proceeding itself, being one instituted in the County Court of Osage County, Oklahoma, to administer the estate of the decedent, was based upon the conclusive assumption that these lands which has been taken into such administration were the lands of the decedent at the time of and before her death, else that court would have had no jurisdiction of the subject-matter, and in the inception of the administration proceeding Laban Miles had solemnly recited in the petition for the appointment of administrator that the general character and probable value of the estate left by the decedent was as follows:

> "Lands allotted to her, as a member of the Osage Tribe of Indians, in Osage County, Oklahoma, amounting to about 660 acres, of the approximate yearly rental value of $600, and Tribal Trust Funds belonging to her as a member of such Tribe, and to her credit in the Treasury of the United States, together with oil, gas and other mineral annuities of the approximate yearly income of $600;"

referring to these lands; and these same lands being appraised, and one tract designated as homestead, as part of the estate of the decedent, of which such County Court had jurisdiction, because Lah-tah-sah died seized of such estate, were conclusive admissions on the part of Laban Miles and the administrator, that these same lands had been selected and allotted to decedent in her lifetime.

These parts and the whole of the record show that the case was tried below on that theory, and that the Supreme Court, in finding that these lands were selected

after her death, did so without any testimony in the record to that effect, and in failing to find that they were not allotted to her in her lifetime, disregarded these solemn admissions, recitals and statements of the said Laban Miles and of the administrator, and decided the case upon a theory different from that upon which it had been tried. This, we submit, cannot properly be done. See Aaron et al. vs. United States, 204 Federal 943, in which the Circuit Court of Appeals of the Eighth Circuit held that the theory of a case could not be changed, that admissions made of the allotments of lands to Osage allottees in the trial of a case were conclusive upon the person making such admissions, and that it was immaterial that the deeds were not issued until after the death of the allottee. In that case the court held that the allotments were restricted. And we submit that this question arising in a probate proceeding in the County Court of Osage County, the appellate courts exercised like jurisdiction, and that the theory of such jurisdiction and the records and admissions hereinbefore recited, show conclusively that these lands were of the estate of Lah-tah-sah at the time of her death, and were her lands within the meaning of the Act of April 18, 1912, providing that partition thereof is invalid until approved by the Honorable Secretary of the Interior.

In the instant case the judgment in the partition proceeding had not been followed by an actual partition or sale of the lands, and the Secretary of the Interior had not approved any phase or part of such proceeding. Upon the state of the record the demurrer should have been sustained, and the motion to strike the issues tendered by the answer should have been overruled, and the petitioner should have been permitted to introduce his testimony showing that Laban Miles was not married to and was not

the husband or heir of the deceased. Besides, the court took an erroneous view of the law in concluding that if these lands had not been selected and allotted to the decedent before her death, that they would be unrestricted lands and not within the purpose of the Act of April 18, 1912. The discussion of this will be included under the next sub-head.

Second. The court took erroneous views of the law relative to the restrictive effect of the Osage Allotment Act of June 28, 1906, and the Act of March 3, 1906, supplementary thereto, and the Joint Resolution of Congress referred to above, in holding that they placed no restrictions upon the alienation by heirs of inherited lands, allotted and deeded in the right of a member of the Osage Tribe of Indians after her death; and that the Act of Congress of April 18, 1912, had no application thereto. Under this heading will be considered the reasons and errors hereinbefore designated as "(g)" and "(h)."

Prior to the division of the lands of the Osage Indians in Oklahoma, the Osage Tribe of Indians, having received conveyance of the Reservation from the Cherokee Nation, occupied the same under the authority of the United States, and were unable to convey any part of it without the authority of the Government. Labadie vs. United States, 51 Pac. 666, 6 Okla. 400. The Tribe, in relation to its members, was the repository of title in trust for them, without power to execute the trust in any respect without the authority and only according to limitations of Congressional legislation. U. S. vs. Aaron et al., 183 Federal 347. It follows that the Osage lands as such were subject to restrictions without the affirmative action of Congress at the time of the passage of the Allotment Act, and that any Congressional provision for their allotment and sale by individuals impliedly excluded their

sale in any other way, and no individual was authorized to sell without a certificate of competency.

Stephens vs. *Smith,* 10 Wall, 321, 19 L. Ed. 933;

And whatever restriction was on the land, however imposed, ran with the land and bound the heir as well as the allottee.

Goodrun vs. *Buffalo,* 162 Fed. 817.

Lovindale Lead & Zinc Mining Co. vs. *Coleman,* 140 Pac. 607, 43 Okla. 13.

This last decision was reversed by this court, reported in Lovindale Lead & Zinc Mining Co. et al. vs. Coleman, 241 U. S. 432, 60 L. Ed. 1080, on the ground that Coleman was a white man, not a member of the Osage Tribe of Indians, nor within the policy of Congress with respect to the protection of Indians, the court saying:

> "We confine ourselves to the single point presented. There is no controversy whatever as to the authority of the Secretary of the Interior, where there are undivided interests belonging to Indians, adequate to protect those interests according to the statutory provisions to this end. Our conclusion simply is that the Act of 1906 placed no restrictions upon the alienation of lands, or undivided interest in lands, of which white men who were not members of the Tribe became owners."

The first section of the Osage Allotment Act provided for preparation of the roll of the Tribe as it existed on the first day of January, 1906; and Section 2 provided, "that all lands belonging to the Osage Tribe of Indians in Oklahoma Territory, except as herein provided, shall be divided among the members of said Tribe, giving to each, his or her fair share thereof in acres, as follows:" This included Lah-tah-sah, and by virtue of that legislation she became entitled to her share of the tribal lands

within the limitations imposed by Congress. The next subdivision of Section 2 provides for the selection of the several allotments up to and including the third. Then the fourth sub-division of the same section provides:

> "Each member of the Tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and non-taxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as surplus land, and shall be inalienable for twenty-five years, except as hereinafter provided."

The seventh sub-division of the same section provides:

> "That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control and dispose of his or her lands the same as any citizen of the United States;"

then concluding with other provisions not relevant hereto.

It will be observed that this seventh sub-division provides how any land deeded an Indian under the provisions of this Act may be sold, which obviously includes any land acquired by the Indian under the provisions of the

Act, that is, homestead, surplus or residue land, or land inherited, whether allotted to his ancestor in her lifetime or not. Every part of the land formerly comprising the Osage Reservation, received in severalty by the members of that Tribe under the provisions of this Act, which included the lands in question here, without regard to the refinements which have been attempted, may be sold only after an investigation by the Secretary of the Interior and the issuance to such Indian of a certificate of competency. Under the holding in Stevens vs. Smith, *supra*, this section providing how the lands may be sold, impliedly excludes their sale in any other way.

Section six of the Act provides:

> "That the lands, moneys and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys, and mineral interests must go to the mother and father equally."

And Section seven provides:

> "That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided; and said members, or their heirs, shall have the right to use and to lease said lands for farming, grazing, or any other purpose not otherwise specifically provided for herein, and said members shall have full control of the same, including the proceeds thereof; provided, that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority; and provided further, that all leases given on said lands for the benefit of the individual members of the tribe entitled thereto, or for

their heirs, shall be subject only to the approval of the Secretary of the Interior."

These restricted tribal lands being divided among the members of the Tribe according to the roll as of January 1, 1906; and descending to their heirs for the use of such, with the requirement that the Secretary of the Interior approve leases thereon, without any indications of legislative distinction depending upon whether the ancestor died before or after allotment, so obviously bring the whole of such lands within the manifest policy of the legislation to protect the Indian members until the Secretary of the Interior shall find them competent to manage their own affairs, that speculative and strained analogies to the contrary should not be considered. Section six comprehends all classes of heirs, whether their ancestors died before or after allotment; and Section seven sets aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, as therein provided, the lands coming within the scope of that legislation, which were all the lands of such Reservation, including the lands in controversy here. Here the Indian use is made prominent. It suggests that phase of rights long enjoyed by Indians in the occupancy of their lands, whether communal or in severalty, which did not include the right of alienation; and the fact that the Secretary of the Interior is required to approve leases, whether for the benefit of a member of the Tribe or for an heir, shows that the system of restriction imposed, while giving the Indian title to the land, left him without power of alienation as to any of such land, however acquired, under the terms of the Act, until the Secretary of the Interior should find him competent to manage his own affairs, and issue to him a certificate to that effect.

The Coleman case, *supra,* holding that Coleman, being a white man, did not come within this protective

policy, by its very care in distinguishing between the status of Coleman and an Indian heir, suggests the correctness of our contention.

The Act of March 3, 1909, provided:

> "That the Secretary of the Interior be and he hereby is authorized and empowered, upon application, to sell, under such rules and regulations as he may prescribe, part or all of the surplus lands of any member of the Kaw or Kansas and Osage Tribes of Indians in Oklahoma; provided, that the sales of the Osage lands shall be subject to the reserved rights of the Tribe in oil, gas and other minerals."

The word "member" here is obviously used to include any member of the Tribe holding such lands, either by allotment or inheritance. There is no legislative indication of distinction between the members holding by allotment and members holding through inheritance. The obvious purpose is to protect the Indians against being overreached by designing white men, and to put the duty of protection upon the Secretary of the Interior; and under the rule in Stevens vs. Smith, *supra,* this Act, providing how such lands may be sold, impliedly prohibits their sale in any other way. This legislation is unlike, in this respect, the legislation affecting the Five Civilized Tribes in Oklahoma, and the decisions under the Five Civilized Tribes legislation are inapplicable here.

Third. The court erred in holding that the District Court of Osage County had jurisdiction to partition the lands involved, and that its judgment was conclusive of the rights of the parties in this proceeding to share equally in the disposition of the lands in question; and under this heading we will consider reasons "(i)" to "(n)" inclusive.

Such court had no jurisdiction over these lands, except such as may have been given by Act of Congress.

McKay vs. *Halyston,* 204 U .S. 458, 51 L. Ed. 566.

U. S. vs. *Richert,* 188 U. S. 432, 47 L. Ed. 532.

U. S. ex rel. West, vs. *Hitchcock,* 205 U. S. 80, 51 L. Ed. 718.

And the only jurisdiction given such court being that to partition subject to the approval of the Secretary of the Interior, if these were restricted lands the findings as to the rights of heirs and the decree of partition were not judicial actions; but being subject to the review of the Secretary of the Interior, they were merely ministerial or administrative actions.

U. S. vs. *Ferrerio,* 18 How. 41, 14 L. Ed. 42.

Gordon vs. *U. S.,* 2 Wall, 561, 17 L. Ed. 921.

In the Matter of Sambora, 148 U. S. 222, 37 L. Ed. 429.

S. Dakota vs. *S. Carolina,* 48 L. Ed. 461.

La Abra Silver Min. Co. vs. *U. S.,* 175 U. S. 455, 44 L. Ed. 234.

Dist. of Columbia vs. *Eslin,* 183 U. S. 62, 46 L. Ed. 85.

Cochran et al. vs. *Blank et al.,* 156 Pac. 324.

Hope vs. *Foley,* 157 Pac. 727.

Tiger et al. vs. *Creek County,* 146 Pac. 912.

And not being judicial action it could not be *res adjudicata* of the issues it attempted to determine, else one could be concluded in his rights without his consent and without his day in court. Nor did it have the finality giving it the force of *res adjudicata.*

Bigelow on Estoppel, 64, 65.

23 Cyc. 1128.

And not being valid as to the subject-matter with respect to which the jurisdiction was conferred, the partition of the land, it would not be valid as to the incidental question of heirship which it attempted to settle.

2 Black on Judgments, 611, 613.

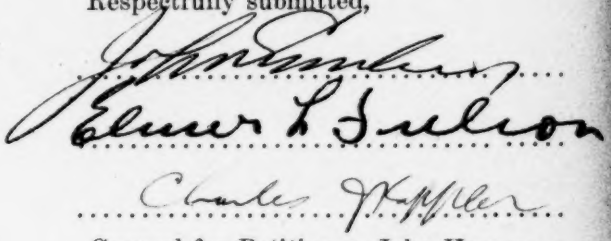
If this partition judgment required, for its validity, the approval of the Secretary of the Interior, it would logically follow that the incidental determination of heirship would have no validity without such approval, else it would accomplish indirectly, by being used in an administration proceeding, what Congress expressly provided against without the Secretary's approval.

In conclusion, the petitioner was denied the right to refute the issues which took from him one-half of this estate by a judgment not approved by the Secretary of the Interior and having no validity until it was so approved; and these rights, title, privileges and immunities taken from him, were given him under, and protected by, statutes of the United States. If it be suggested that petitioner had one trial of his rights in the action to partition the lands, and that the issues were found against him, we reply that Congress, for reasons it considered sufficient, placed this class of Osage Indians under the protection of the Secretary of the Interior; and notwithstanding the findings and judgment for the partition of this land, the Honorable Secretary of the Interior has never seen fit to approve it; and if the result was so inequitable and unfair that the Secretary would not approve it, it certainly follows that the petitioner should have had the right, in the administration proceeding, to a fair trial of these issues, and especially so since, as we submit, the law gave him the right thereto.

The State Supreme Court, in the decision in this case, laid down rules of law necessarily affecting many like cases and much of the lands allotted to Osage Indians and involving the rights of a great many of such Indians, and the decision in the Coleman case, *supra,* by this court, not having affirmatively decided the issues involved

herein, and so affecting so many of the Osages, we submit that this case is of that public interest and importance and this petitioner's contentions have that merit that the writ of certiorari should issue in this case.

Respectfully submitted,



Counsel for Petitioner, John Kenny.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

JOHN KENNY, PETITIONER,
v.
LABAN MILES AND JOHN L. BIRD, administrator of the estate of Lah-tah-sah, deceased. } No. 1093.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

SUGGESTIONS OF THE UNITED STATES IN SUPPORT OF THE PETITION.

(The opinion of the Supreme Court of Oklahoma will be found in the record at page 126 and in volume 162 of the Pacific Reporter at page 775.)

STATEMENT OF FACTS.

The petition of John Kenny seeks to bring up for review a judgment of the Supreme Court of the State of Oklahoma affirming a judgment of the District Court of Osage County in that State ordering a partition of the lands patented to a deceased member of the Osage Tribe of Indians under the act of Congress approved June 28, 1906, 34 Stat. 539.

The facts necessary to a consideration of the petition may be briefly stated as follows: Lah-tah-sah, a female full-blood member of the Osage Tribe of

Indians, died on or about August 19, 1908 (R. 4, 49), having received an allotment of lands, but no certificate of competency had been issued to her, nor had the restrictions on the alienation of her lands been removed (R. 46). Allotment deeds or patents were thereafter issued to her, the deed conveying her homestead having been executed September 23, 1908, and the deed conveying the surplus land, or all in excess of the homestead, on May 5, 1909. These deeds were approved by the Secretary of the Interior February 20, and July 30, 1909 (R. 67, 69). The allottee was survived by her son, the petitioner herein, who is likewise a full-blood member of the Osage Tribe; and also Laban Miles, one of the respondents, himself a full-blood Osage Indian, and who claimed to be the surviving husband of Lah-tah-sah. Neither Kenny nor Miles had received a certificate of competency.

On February 28, 1912, Miles instituted an action in the District Court of Osage County to effect a partition of the lands allotted to Lah-tah-sah, alleging that he was her surviving husband and that he and Kenny, the latter being the only child of the allottee, each succeeded to an undivided one-half of the lands allotted and patented in her name. To this petition Kenny filed an answer and cross-petition, averring that he was the only heir of the decedent and the sole owner of the lands in question, and, as such, entitled to the exclusive possession thereof; that the claim of Miles constituted a cloud upon his title and he prayed for relief accordingly. The

question involved in that case was the marriage of Miles to the allottee, which the court, after hearing evidence, determined in favor of Miles, ordered a partition of the lands and appointed commissioners for that purpose (R. 49–54).

While that case was pending Miles filed a petition in the county, or probate, court asking the appointment of John L. Bird, the other respondent herein, as administrator of the estate (R. 4). This was done, and the administrator thereafter filed a final account and asked that the heirs be determined, and that he be allowed to make a distribution of the lands and the income derived therefrom (R. 13). Kenny appeared in that proceeding, asserting that he was the sole heir of the allottee and entitled to the entire estate, whereupon Miles responded, claiming that that question was *res adjudicata*, as it had been tried and finally determined by the District Court of Osage County in the partition action that he had instituted on February 28, 1912, wherein it had been adjudged that he was entitled to a half interest in the distribution of the lands and proceeds. To this plea of *res adjudicata* Kenny demurred. The demurrer was overruled, and upon hearing the property was ordered distributed equally between him and Miles (R. 14–22).

An appeal was taken from the county court to the District Court of Osage County, where the action of the lower court was affirmed. A further appeal was taken to the Supreme Court of the State, where the judgment now sought to be reviewed was entered. The Supreme Court held that the act of 1906,

supra, placed no restrictions upon alienation by heirs of inherited lands allotted and deeded in the right of a member of the Osage Tribe after his death, and that the evident purpose of the act of April 18, 1912, 37 Stat. 86, was not to impose restrictions upon alienation of Osage lands, but, on the contrary, to authorize the conveyance of those lands allotted to living members of the tribe who had subsequently died leaving surviving them Indian heirs, members of the tribe, to whom certificates of competency had been issued.

THE LAW INVOLVED.

Prior to their allotment the lands in question were Indian lands and there is no doubt as to the power of Congress to impose restrictions upon alienation in providing for their allotment in severalty. The allotments were made under the act of June 28, 1906, *supra*, and to that act, therefore, and subsequent legislation on the subject, we must look to determine this question.

The provisions of that act were fully reviewed by this court in its somewhat recent decision in *Levindale Lead and Zinc Mining Co.* v. *Coleman*, 241 U. S. 432, and it will be sufficient therefore to make only a brief reference to those provisions which are regarded as directly in point.

The lands were to be divided among members of the tribe, giving to each his fair share, each member being allowed to make three selections of 160 acres each (sec. 2). Each member of the tribe was authorized to designate which of his three selections should

be a homestead, and his certificate of allotment and the deed issued thereon should designate the same as a homestead, and the same was to be inalienable and non-taxable until otherwise provided by act of Congress. The two other selections of each member were to be known as surplus lands and made inalienable for 25 years, except as otherwise provided (sec. 2, par. 4). Section 6 provided that the lands, moneys, and mineral interests of any deceased member of the tribe should descend to his or her legal heirs, according to the laws of the Territory of Oklahoma or the State in which the lands might be thereafter incorporated, except that where the decedent left no issue, nor husband nor wife, the lands, moneys, and mineral interests should descend to the mother and father equally.

Section 7 provided that the lands allotted were to be set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, and that said members or their heirs should have the right to use and lease the lands for farming, grazing, or any other purpose not otherwise specifically provided for, there being a proviso to the effect that all leases given on lands for the benefit of the individual members of the tribe or for their heirs should be subject only to the approval of the Secretary of the Interior.

Deeds for these lands were to be executed by the principal chief of the tribe, but were not to be valid until approved by the Secretary of the Interior (sec. 8), and there was a further provision to the effect that whatever was necessary to carry out the

provisions of the act should be done under the authority of the Secretary of the Interior.

The act of April 18, 1912, *supra*, is supplementary to, and amendatory of, the act of 1906 and provides, among other things, that the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma; and no land is to be sold or alienated under the provisions of this section (3) without the approval of the Secretary of the Interior.

Section 6 of that act provides (37 Stat. 87):

> That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency,

the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attach to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees.

THE FEDERAL QUESTION INVOLVED.

From the foregoing it will be readily seen that the Federal question decided by the State Supreme Court was whether the land in controversy was subject to restrictions on alienation imposed by acts of Congress, and the court decided that question adversely to the petitioner herein who claimed its benefit. The Supreme Court did not decide as to the capacity in which the District Court of Osage County would have acted and the consequent conclusiveness of its judgment in the event it had been held that the lands in question were restricted lands, but, on the contrary, expressly found that to be unnecessary, holding, as stated, that the lands were free from restrictions

and that the District Court of Osage County had jurisdiction to partition them and its judgment was conclusive of the rights of the parties.

It has been settled by this court that the restrictions on alienation of Osage Indian lands imposed by the act of 1906 and recognized or imposed by the act of April 18, 1912, do not necessarily run with the land, but are rather intended for the protection of the incompetent members of the tribe; and hence where lands allotted to an incompetent Indian descend to a white man, one of the allottee's heirs, such lands are no longer subject to any restrictions on alienation. *Levindale Lead and Zinc Mining Co.* v *Coleman*, 241 U. S. 432.

While the question here in controversy was not involved in the case cited, the court clearly indicated its views upon the subject by the use of the following language (p. 440):

> * * * There is no controversy whatever as to the authority of the Secretary of the Interior, where there are undivided interests belonging to Indians, adequately to protect those interests according to the statutory provisions to this end. Our conclusion simply is that the act of 1906 placed no restrictions upon the alienation of land, or undivided interests in land, of which white men who were not members of the tribe became owners.

The contention of the respondents that the restrictions on alienation imposed by the act of 1906 applied only to lands allotted to living members is not only inconsistent with the evident purpose of the act, but

is flatly contradicted by that provision in section 7 which declares that leases given for the benefit of individual members "or their heirs" shall be subject to the approval of the Secretary of the Interior; it is also in direct conflict with that provision of section 6 of the supplementary act of 1912, which declares that—

> * * * When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed.

If these lands were restricted, as we believe they were, a partition of them by the State courts would be effective only when approved by the Secretary of the Interior as provided in section 6 of the act of 1912, and the judgment of the State Supreme Court holding that the district court had complete jurisdiction to partition the lands was therefore erroneous.

We are advised that the decision in this case will control the disposition of many allotments held by incompetent members of the Osage Tribe of Indians, and we respectfully submit that the petition for certiorari should be granted.

JOHN W. DAVIS,
Solicitor General.

S. W. WILLIAMS,
Attorney.

MAY, 1917.

○